PD-0790-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 8/26/2020 2:51 PM
Accepted 8/28/2020 9:13 AM
DEANA WILLIAMSON
CLERK

No. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
8/28/2020
DEANA WILLIAMSON, CLERK

ROBERTO HERNANDEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Navarro County, Trial Cause D38732-CR
No. 10-19-00252-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

EMILY JOHNSON-LIU
Assistant State's Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant Roberto Hernandez.

- The trial judge was Hon. James Lagomarsino, Presiding Judge of the 13th District Court, Navarro County, Texas.

- Counsel for Appellant at trial was Damara Watkins, 1541 Princeton, Corsicana, Texas 75110.

- Counsel for Appellant on appeal was Shana Stein Faulhaber, 115 W. Collin Street, Corsicana, Texas 75110.

- Counsel for the State at trial were Navarro County Assistant District Attorneys Kenneth Leatherman and Bolton Harris, 300 W. 3rd Ave, Suite 301, Corsicana, Texas 75110.

- Counsel for the State before the Court of Appeals was Robert Koehl, Assistant District Attorney, 300 W. 3rd Ave, Suite 301, Corsicana, Texas 75110.

- Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

No. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ROBERTO HERNANDEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Navarro County, Trial Cause D38732-CR
No. 10-19-00252-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully urges this Court to grant discretionary review. The court of appeals held that the appellant was entitled to an instruction on a lesser-included sex offense because his testimony offered an alternative version of the incident. It should have analyzed whether Appellant's version involved the same elements and unit of prosecution.

STATEMENT REGARDING ORAL ARGUMENT

No discussion is needed to determine that the court of appeals's analysis is erroneous, but the State asks for argument because the Court may profit from discussing how this case fits into others involving entitlement to defensive instructions and whether a defendant's version of things is responsive to the offense on trial.

STATEMENT OF THE CASE

Appellant was indicted for aggravated sexual assault of a child.[1] The trial court denied his request for lesser-included-offense instructions on indecency with a child by contact and exposure.[2] The jury convicted him and assessed a 35-year sentence.[3] On appeal he complained about the omission of the indecency-by-contact lesser; the omission of an exposure lesser went unchallenged.[4] The court of appeals agreed it was error to omit indecency by contact from the charge and remanded for a new trial.[5]

---

[1] CR 19.
[2] 5 RR 9, 11-12.
[3] 5 RR 51, 195.
[4] App. COA Brief at 6, 7.
[5] *Hernandez v. State*, No. 10-19-00252-CR, 2020 WL 4360789 (Tex. App.—Waco, July 29, 2020) (not designated for publication).

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its opinion on July 29, 2020. No motion for rehearing was filed. This petition is due by August 28, 2020.

GROUNDS FOR REVIEW

(1) Is indecency by touching the victim's sexual organ a lesser-included offense of penetrating the child's mouth with the defendant's sexual organ if the former is the defendant's version of the incident?

(2) For indecency by contact to be a lesser of aggravated sexual assault, must the act on which the indecency is predicated have the potential to be factually subsumed within the aggravated sexual assault?

ARGUMENT

Background

Appellant was accused of penetrating a ten-year-old girl's mouth with his penis.[6] She testified he led her into a storage container on the property where they were living, lowered her to her knees, and placed his "middle part" in her mouth.[7] She outcried soon afterward, and Appellant was arrested and gave a statement to police.[8] It was admitted at trial. In it, Appellant acknowledged that they removed

---

[6] CR 19.
[7] 3 RR 101, 107-10.
[8] 3 RR 113.

some of their clothing in the storage container, he touched her sexual organ with his hand, and he hugged her while they were naked from the waist down.[9] He denied anything else.[10]

Appellant's trial testimony was similar.[11] He denied oral sex but admitted using his hand to touch her sexual organ with a sexual purpose, both with and without her clothes on.[12] He also pulled her body next to his while they were naked from the waist down.[13] He denied ever lowering her to her knees and said they were both standing the whole time.[14] Neither her mouth nor her face touched his penis.[15] He agreed it was likely or probable that "[a]t some point," his penis touched her body when he pressed his body up to hers.[16] His description of how they were positioned is unclear, but they were not facing each other.[17]

---

[9] 3 RR 81-88.
[10] 3 RR 84.
[11] 4 RR 18.
[12] 4 RR 18-19.
[13] 4 RR 20-21. Although Appellant may have also committed indecency by exposure, failure to submit that offense was not raised as an issue on appeal, and the record is not clear on certain facts, such as the length of Appellant's shirt and whether the indecency by contact by touching her body with his penis occurred through clothing.
[14] 4 RR 21.
[15] 4 RR 41, 78.
[16] 4 RR 98, 100.
[17] 4 RR 21, 78-79, 100.

The parties' arguments in the court of appeals

On appeal, Appellant argued his request for a lesser of indecency by contact should have been granted because both sides presented evidence of a single act of inappropriate behavior in the storage container and that his evidence constituted a lesser included version.[18] Under *Hall v. State*'s cognate-pleadings approach to lessers, an offense can be submitted as a lesser-included offense if (1) it meets the test under TEX. CODE CRIM. PROC. art. 37.09[19] for a lesser-included offense by comparison of the statutory elements as alleged in the indictment, and (2) there is evidence at trial that, if the defendant is guilty, he is guilty only of the lesser.[20] The State conceded that indecency with a child can be a lesser-included of aggravated sexual assault and called this the first step of *Hall*.[21] The State also argued—as part of the second step—that touching the victim's sexual organ was not a lesser in this instance because it was a "separate and distinct offense" from the charged aggravated sexual assault and inadvertently touching the victim's body with his

---

[18] App. COA Brief at 8-10. In the defense's view, only a single act occurred: the jury could rationally believe the girl's version did not happen and that she confused an earlier incident when her brother had her perform oral sex on him.

[19] Article 37.09 sets out four definitions of a lesser. At issue here, it provides that "An offense is a lesser included offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged."

[20] 225 S.W.3d 524, 535 (Tex. Crim. App. 2007).

[21] State COA Brief at 1-2, 4.

penis did not constitute "the same or less than all the facts" required for the aggravated sexual assault and did not otherwise warrant submission to the jury.[22]

The court of appeals's decision

The court of appeals's resolution of the first step of *Hall* was swift: "The State concedes, and we agree, that the offense of indecency with a child by contact can be a lesser-included offense of aggravated sexual assault of a child."[23] It cited *Ochoa v. State*[24] with the parenthetical that indecency is a lesser when both offenses are "based on the same incident."[25]

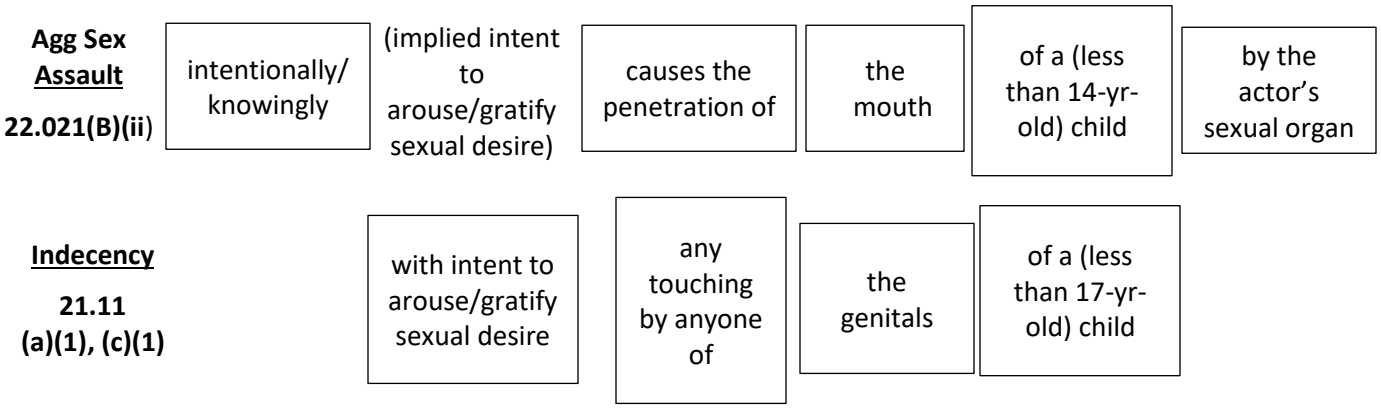
It then proceeded to the second step. There, it concluded that submission of indecency with a child by contact was warranted because, while Appellant denied penetrating the child's mouth with his penis, he "offered a valid, rational alternative version of the incident, which included his admission to a different offense—indecency with a child by contact."[26] It never specified which indecency warranted the instruction.[27]

---

[22] *Id*. at 2, 5-6.
[23] *Hernandez*, 2020 WL 4360789, at *2.
[24] 982 S.W.2d 904, 908 (Tex. Crim. App. 1998).
[25] *Hernandez*, 2020 WL 4360789, at *2.
[26] *Id.*
[27] *Id.* ("[A]ppellant denied that he intentionally or knowingly touched the child victim at all with his penis. Rather, appellant admitted to touching the child victim inappropriately with his hands with intent to arouse his sexual desire while they were both inside the

Fondling the victim's genitals isn't a lesser under an elements analysis.

From among the various statutory means of committing aggravated sexual assault of a child, this indictment selected one: penetrating the child's mouth with the defendant's sexual organ.[28] To constitute a lesser, the proposed offense must contain the same or less than all these elements.[29] Indecency by contacting the *victim's* sexual organ does not:



Touching can obviously be less than penetration and intent to arouse or gratify has been deemed not to be a difference, but the two offenses involve different body parts. And these differences are at the level of elements.[30] Penetrating the child

---

container. Appellant further testified that both he and the child victim pulled their pants down while in the container, and appellant pulled the child victim close to him and rubbed their bodies together.").

[28] TEX. PENAL CODE § 22.021(a)(1)(B)(ii).

[29] TEX. CODE CRIM. PROC. art. 37.09(1).

[30] The offense of indecency by contact is structured in two parts—§ 21.11(a) prohibits engaging in "sexual contact" (as differentiated from exposure) and § 21.11(c) defines the

victim's orifice has long been considered a separate offense from contacting the child's genitals.[31] Here, the prosecutors treated them as separate offenses by listing the fondling in the State's extraneous offense notice.[32]

Because contact with the victim's genitals is not alleged in this indictment nor can its elements be deduced therefrom, it is not a lesser under *Hall*. To the extent the court of appeals conducted a comparison of elements at all, it erred by ignoring the cognate-pleadings approach.

The genital fondling is also not a lesser for the same reason as the second possible indecency (contacting the victim's torso or limbs with his penis). That flaw, discussed next, is that these proposed lessers constitute different units of prosecution, and thus different offenses, from the aggravated sexual assault charged

---

conduct constituting "sexual contact." The definitions in § 21.11(c) thus become elements of indecency by contact. *See Pizzo v. State*, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007) (relying on definition of "sexual contact" to hold that touching the anus, touching the breast, and touching the genitals each constitutes a different criminal offense for jury-charge unanimity purposes); *see also Speights v. State*, 464 S.W.3d 719, 723 (Tex. Crim. App. 2015) (indecency by contact and indecency by exposure set out separate allowable units of prosecution); *Geick v. State*, 349 S.W.3d 542, 546-47 (Tex. Crim. App. 2011) (in variance context, definitions within theft statute set out elements of narrowed, more specific offenses encompassed within the general theft statute).

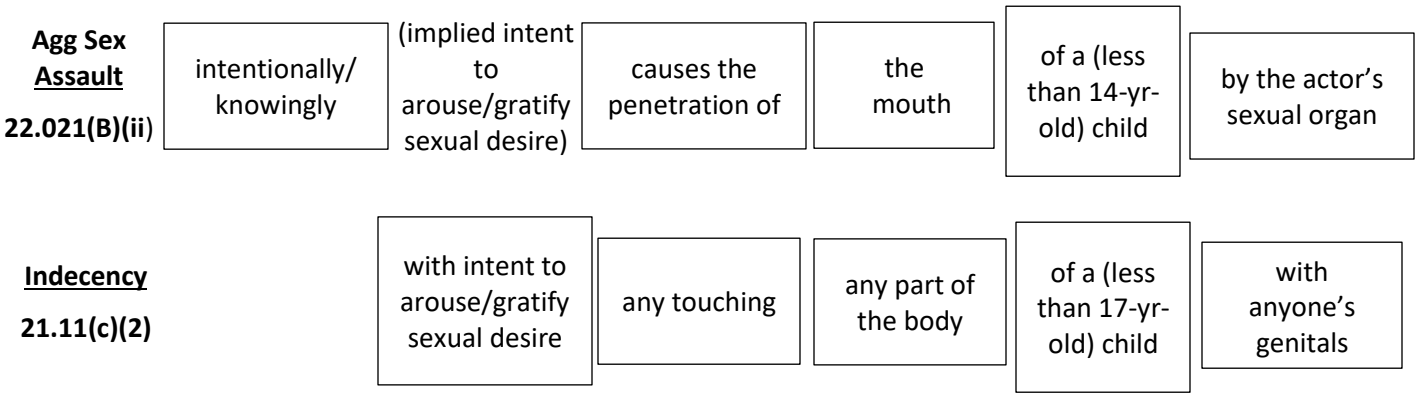
[31] *See McIntire v. State*, 698 S.W.2d 652, 656 (Tex. Crim. App. 1985) (affirming court of appeals' decision to vacate indecency conviction because of improper joinder: it couldn't be joined in the same indictment with aggravated sexual abuse of a child because it was a "separate and distinct" offense).

[32] CR 28.

in the indictment.

Contacting the victim's torso or limbs with his penis isn't a lesser because it's a different unit of prosecution.

Some forms of indecency with a child by touching the child's body with the defendant's genitals are a subset of this aggravated sexual assault.



In *Cunningham v. State*, this Court determined that licking the defendant's sexual organ was such a lesser.[33] It obviously constitutes touching part of the body of the child, *i.e.*, the tongue, and the Court could reason that the tongue, as part of the mouth, was some or less than all the facts required to prove aggravated sexual assault's element that the offense involve the mouth. And in *Patterson*, this Court said that penile contact with a child's mouth in the course of the penetration would

[33] 726 S.W.2d 151, 151 & n.1, 154 (Tex. Crim. App. 1987), *rationale disapproved of by Hall*, 225 S.W.3d at 531 & n.30.

be a subsumed lesser.[34] An offense may be factually subsumed when there is a single act that cannot physically occur in the absence of another act.[35] Such a standard meets the same or less than all the statutorily pled elements of the greater because it is impossible to commit the charged offense without also committing that lesser.

The abstract elements of Appellant's grazing the victim's body are consistent with Section 21.11(c)(2)—"any touching of any part of the [child's] body" with the defendant's genitals. The court of appeals may have believed that this offense met the test for a lesser in the abstract. After all, *Hall* states that the statutory elements—not the *facts* of the proposed lesser—are to be compared to the elements of the greater in the pleadings.[36] But *Hall* does not involve the possibility of different units of prosecution; it only decided how abstract or particular to consider the greater offense for comparison. A unit of prosecution analysis almost always entails

---

[34] *Patterson v. State*, 152 S.W.3d 88, 92 (Tex. Crim. App. 2004); *see also Aekins v. State*, 447 S.W.3d 270, 277 n.28 (Tex. Crim. App. 2014) ("[O]ne rape will frequently involve the defendant's acts of exposing his genitals, then contacting the victim's genitals with his own, then penetrating the victim's genitals with his. It is a 'continuing' crime in the sense that the defendant commits several criminal acts on the way to completing the rape, but the lesser acts of exposure and contact merge into the ultimate act of penetration.").

[35] *Maldonado v. State*, 461 S.W.3d 144, 149 (Tex. Crim. App. 2015).

[36] *Safian v. State*, 543 S.W.3d 216, 220 (Tex. Crim. App. 2018) (citing *Ex parte Castillo*, 469 S.W.3d 165, 169 (Tex. Crim. App. 2015) and *Hall*, 225 S.W.3d at 531)).

considering more than statutory elements.[37] *Hall* does not hold that stepping on the victim's toe and causing her pain can be a lesser of the aggravated assault of breaking her foot, even if the statutorily pled elements are a subset of the other. That issue is controlled outside a *Hall* analysis by *Campbell v. State*[38] and *Bufkin v. State*.[39]

The purpose of a lesser in this context is to allow the defendant to reduce his liability to the appropriate level within the offense he is charged—not shift attention to another, but less serious offense he is willing to admit.[40] This Court should review this case to clarify how *Hall* and these unit-of-prosecution cases interact.

Under a proper *Campbell-Bufkin* analysis, Appellant's penile grazing constituted a different unit of prosecution than a factually subsumed lesser like touching the victim's face, tongue, or mouth with his sexual organ. As this Court's Double Jeopardy cases have repeatedly held, the unit-of-prosecution for nature-of-

---

[37] *Ex parte Castillo*, 469 S.W.3d at 169 ("We determine factual sameness by determining the allowable unit of prosecution and reviewing the trial record to establish how many units have been shown."); *see Byrd v. State*, 336 S.W.3d 242, 252 (Tex. Crim. App. 2011) (the property owner in a theft offense is not a statutory element but must be proven and defines the unit of prosecution); *Fuller v. State*, 73 S.W.3d 250, 256–57 (Tex. Crim. App. 2002) (Keller, P.J., concurring) (non-statutory facts can define allowable unit of prosecution).

[38] 149 S.W.3d 149 (Tex. Crim. App. 2004).

[39] 207 S.W.3d 779 (Tex. Crim. App. 2006).

[40] *Id*. at 781 ("the defendant cannot foist upon the State a crime the State did not intend to prosecute in order to gain an instruction on a defensive issue or a lesser included offense.").

conduct sex offenses like sexual assault[41] and indecency[42] is each separately prohibited act, even for acts committed on the same date or during the same transaction.[43] That Appellant's was a different version of what happened in the storage container does not make it a lesser-included offense. Because grazing the victim's torso with his penis while giving her a standing hug could never be part of the same act as causing his penis to penetrate her mouth, it cannot be a lesser.

This Court should grant review to explain that admitting a lesser sex offense during the same transaction is not enough—it must actually be predicated on the same act.[44]

---

[41] *Vick v. State*, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999) (aggravated sexual assault is conduct-oriented and "each separately described conduct constitutes a separate statutory offense"); *Gonzales v. State*, 304 S.W.3d 838, 848 (Tex. Crim. App. 2010) (discretely prohibited acts of aggravated sexual assault are separate offenses for double-jeopardy purposes even within the same subsection); *Metcalf v. State*, 597 S.W.3d 847, 857 (Tex. Crim. App. 2020) (same for sexual assault).

[42] *See Loving v. State*, 401 S.W.3d 642, 649 (Tex. Crim. App. 2013) (commission of each prohibited act determines number of possible convictions for particular course of conduct); *Francis v. State*, 36 S.W.3d 121, 124 (Tex. Crim. App. 2000) (touching the victim's breast and genitals constituted separate indecencies that jury would have to be unanimous about); *Pizzo*, 235 S.W.3d at 717 (each prohibited act of indecency represents a different offense).

[43] *Maldonado*, 461 S.W.3d at 147 (stating that, for sexual assaults, "Even separate acts that occur close in time can be separate offenses if each involves a separate impulse or intent").

[44] *See id.* at 149.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the judgment of the court of appeals, and affirm Appellant's conviction.

Respectfully submitted,

STACEY M. SOULE
State Prosecuting Attorney

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 2,513 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 26th day of August 2020, the State's Petition for Discretionary Review was served electronically on the parties below.

Robert Koehl
Asst. District Attorney
rkoehl@navarrocounty.org

Shana Stein Faulhaber
Counsel for Roberto Hernandez
shana@shanastein.com

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

APPENDIX

Court of Appeals's Opinion

2020 WL 4360789
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Do not publish
Court of Appeals of Texas, Waco.

Roberto HERNANDEZ, Appellant
v.
The STATE of Texas, Appellee

No. 10-19-00252-CR
|
Opinion delivered and filed July 29, 2020

From the 13th District Court, Navarro County, Texas, Trial Court No. D38732-CR

Attorneys and Law Firms

Shana Stein Faulhaber, for Appellant.

William James Dixon, Robert L. Koehl, for Appellee.

Before Chief Justice Gray, Justice Davis, and Justice Neill

MEMORANDUM OPINION

JOHN E. NEILL, Justice

***1** In one issue, appellant, Roberto Escobar Hernandez, contends that the trial court abused its discretion by denying his request for a lesser-included-offense instruction in the jury charge. We reverse and remand.

I. BACKGROUND

Appellant was charged by indictment with aggravated sexual assault of a child, a first-degree felony. *See* TEX. PENAL CODE ANN. § 22.021(a)(2)(B). Specifically, the indictment alleged that appellant,

> on or about the 1st day of September, 2018, ... did then and there intentionally and knowingly cause the penetration of the mouth of [the child victim], a child who was then and there younger than 14 years of age and not the spouse of the defendant, by the Defendant's sexual organ....

This case proceeded to a trial before a jury.

At the charge conference, defense counsel requested instructions on the offenses of indecency with a child by contact and indecency with a child by exposure as lesser-included offenses and provided the trial court with a proposed jury charge. The trial court denied appellant's requested jury-charge instructions.

The jury ultimately found appellant guilty of the charged offense and assessed punishment at thirty-five years' incarceration in the Institutional Division of the Texas Department of Criminal Justice. The trial court certified appellant's right of appeal, and this appeal followed.

II. ANALYSIS

In his sole issue on appeal, appellant argues that the trial court abused its discretion by denying his request for an instruction in the jury charge on the offense of indecency with a child by contact as a lesser-included offense. We agree.

A. Instructions on Lesser-Included Offenses and Jury-Charge Error

We review a trial court's refusal to include a lesser-included-offense instruction for an abuse of discretion. *See Threadgill v. State*, 146 S.W.3d 654, 666 (Tex. Crim. App. 2004). An offense is a lesser-included offense if, among other things, it is established by proof of the same or less than all the facts required to establish the commission of the offense charged. *See* TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (West XXXX); *Hall v. State*, 225 S.W.3d 524, 527 (Tex. Crim. App. 2007). The Court of Criminal Appeals has set forth a two-step analysis to determine whether a defendant is entitled to a lesser-included-offense instruction. *Hall*, 225 S.W.3d at 535-36; *see Jones v. State*, 241 S.W.3d 666, 670 (Tex. App.—Texarkana 2007, no pet.). Under the "cognate-pleadings" test, as set forth in *Hall*, the first step concerns whether a lesser-included offense exists based on a comparison of the greater offense, as contained in the charging document, and the lesser offense, without looking to the evidence adduced in that particular case. *Hall*, 225 S.W.3d at 526; *see Jones*, 241 S.W.3d at 670. "This is a question of law, and it does not depend on the evidence to be produced at trial." *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011). Only after the first step is answered positively do we proceed to the second step of conducting an inquiry concerning whether there was sufficient evidence at trial to have required the court to submit to the jury the issue of the lesser-included offense. *Jones*, 241 S.W.3d at 670-71.

***2** The State concedes, and we agree, that the offense of indecency with a child by contact can be a lesser-included offense of aggravated sexual assault of a child. *See Ochoa v. State*, 982 S.W.2d 904, 908 (Tex. Crim. App. 1998) (concluding that indecency with a child is a lesser-included offense of aggravated sexual assault of a child where both charges are based on the same incident); *see also Evans v. State*, 299 S.W.3d 138, 143 & n.6 (Tex. Crim. App. 2009). We therefore proceed to the second step in the *Hall* analysis.

Step two of the *Hall* analysis involves the consideration of whether there is some evidence that would permit a rational jury to find that, if appellant is guilty, he is guilty only of the lesser offense. *See Cavazos v. State*, 382 S.W.3d 377, 383 (Tex. Crim. App. 2012); *see also Hall*, 225 S.W.3d at 536. "This second step is a question of fact and is based on the evidence presented at trial." *Cavazos*, 382 S.W.3d at 383. A defendant is entitled to a lesser-included-offense instruction if some evidence from any source raises a fact issue on whether he is guilty of only the lesser offense, regardless of whether such evidence is weak, impeached, or contradicted. *Id.* However, a defendant is not entitled to a lesser-included-offense instruction simply because the evidence supporting the greater offense is weak, the evidence supporting the greater charge is discredited or weakened during cross-examination, or the jury might disbelieve crucial evidence pertaining to the greater offense. *See Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994). That is, "there must be some evidence directly germane to a lesser included offense for the factfinder to consider before an instruction on a lesser included offense is warranted." *Id.* "The evidence must establish the lesser-included offense as 'a valid, rational alternative to the charged offense.' " *Rice*, 333 S.W.3d at 145 (quoting *Hall*, 225 S.W.3d at 536).

At trial, the State proffered the testimony of the child victim's mother (the outcry witness); the child victim; and Lieutenant Clint Andrews of the Navarro County Sheriff's Office (the investigator of the alleged incident). The child victim testified that,

while inside a storage container with appellant, appellant lowered the child victim to her knees and inserted his penis into her mouth. The testimony of the child victim's mother and the investigator corroborated much of the child victim's testimony.

Appellant testified on his own behalf and denied inserting his penis into the child victim's mouth. In fact, appellant denied that he intentionally or knowingly touched the child victim at all with his penis. Rather, appellant admitted to touching the child victim inappropriately with his hands with intent to arouse his sexual desire while they were both inside the container. Appellant further testified that both he and the child victim pulled their pants down while in the container, and appellant pulled the child victim close to him and rubbed their bodies together. When asked about the child victim's allegation, appellant suggested that the child victim was lying or confused because the child victim's brother purportedly penetrated the child victim's mouth with his penis days before this alleged incident.

Ordinarily, a defendant's own testimony that he committed no offense, or testimony that otherwise shows that no offense occurred at all, is not adequate to raise the issue of a lesser-included offense. *See Lofton v. State*, 45 S.W.3d 649, 652 (Tex. Crim. App. 2001). Although appellant denied committing the charged offense of aggravated sexual assault of a child by causing the penetration of the child victim's mouth by his penis, appellant offered a valid, rational alternative version of the incident, which included his admission to a different offense—indecency with a child by contact. *See Cavazos*, 382 S.W.3d at 383 (noting that a defendant is entitled to a lesser-included-offense instruction if some evidence from any source raises a fact issue on whether he is guilty of only the lesser offense, regardless of whether such evidence is weak, impeached, or contradicted); *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998) ("If there is evidence within a defendant's testimony which raises the lesser included offense, it is not dispositive that this evidence does not fit in with the larger theme of that defendant's testimony."); *see also Kachel v. State*, No. PD-1649-13, 2015 Tex. Crim. App. Unpub. LEXIS 402, at *8 (Tex. Crim. App. Mar. 18, 2015) (not designated for publication) ("Therefore, a defendant can point to his or her own statements as evidence that he or she is guilty of only the lesser-included offense, even if that defendant also denied committing any offense."). Moreover, appellant's testimony did not rise to the level of a flat denial of any culpability that would prevent the requested lesser-included offense from serving as a "valid, rational alternative to the charged offense." *Rice*, 333 S.W.3d at 145; *see Hall*, 225 S.W.3d at 536; *Lofton*, 45 S.W.3d at 652.

***3** Because the jury may believe all, some, or none of any witness's testimony, *see Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986), a reasonable jury—in light of all the evidence in the record—could have disbelieved the child victim's testimony, as well as the other witnesses called by the State, and believed appellant's version of the events—that he only committed the offense of indecency with a child by contact, not aggravated sexual assault of a child. As such, a reasonable juror could have found appellant guilty of only indecency with a child by contact—an option that was not available to the jury in this case. We therefore conclude that the trial court abused its discretion by denying appellant's request for an instruction on the offense of indecency with a child by contact as a lesser-included offense. *See Cavazos*, 382 S.W.3d at 383; *Hall*, 225 S.W.3d at 535-36; *Threadgill*, 146 S.W.3d at 666; *Jones*, 984 S.W.2d at 257; *see also Kachel*, 2015 Tex. Crim. App. Unpub. LEXIS 402, at *8.

B. *Almanza* Harm Analysis

The erroneous refusal to give a requested instruction on a lesser-included offense is charge error subject to an *Almanza* harm analysis. *See Saunders v. State*, 840 S.W.2d 390, 392 (Tex. Crim. App. 1992) (per curiam) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)). Because appellant objected to the charge, under *Almanza*, we will reverse if the error in the court's charge resulted in some harm to appellant. *See Almanza*, 686 S.W.2d at 171. The harm from denying a lesser-included instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer. *Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005); *see Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995). Typically, if the absence of the lesser-included-offense instruction left the jury with the sole option either to convict the defendant of the charged offense or to acquit him, some harm exists. *See Saunders*, 913 S.W.2d at 571. Because the jury could have reasonably believed that appellant committed the lesser-included offense of indecency with a child by contact, but was only given the option to convict him of the greater offense of aggravated sexual assault of a child, the denial of the requested instruction caused

appellant some harm. *See Masterson*, 155 S.W.3d at 171; *Saunders*, 913 S.W.2d at 571; *see also Almanza*, 686 S.W.2d at 171. As such, we sustain appellant's sole issue on appeal.

III. CONCLUSION

We reverse the trial court's judgment and remand the case for a new trial.

All Citations

Not Reported in S.W. Rptr., 2020 WL 4360789

End of Document

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Stacey Soule on behalf of Emily Johnson-Liu
Bar No. 24032600
information@spa.texas.gov
Envelope ID: 45725231
Status as of 8/28/2020 9:13 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Robert Koehl		rkoehl@navarrocounty.org	8/26/2020 2:51:52 PM	SENT
Shana SteinFaulhaber		shana@shanastein.com	8/26/2020 2:51:52 PM	SENT